In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 210

CHARLES DAVIDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1970. A petition for rehearing was denied on April 20, 1970. The petition for a writ of certiorari was filed on June 1, 1970, and is out of time under Rule 22(3) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether counterfeit currency should have been suppressed as evidence when it was seized from an impounded automobile by state police officers pur-

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suant to a search warrant obtained from a state justice of the peace by state police officials who were cooperating with federal officers.

2. Whether the court of appeals properly could uphold the legality of a search and seizure under a legal theory not considered by the district court.

STATEMENT

After a jury trial in the Northern District of Oklahoma, petitioner was convicted of passing a counterfeit $5.00 federal reserve note in Tulsa, Oklahoma in violation of 18 U.S.C. 472. On April 8, 1969, he was sentenced to imprisonment for five years. The court of appeals affirmed (Pet. App.).

On December 14, 1967, petitioner passed three counterfeit $5.00 Federal Reserve notes, the first at a cafe in Webb City, Missouri (Tr. 59–66), and the other two at gasoline stations in Tulsa, Oklahoma (Tr. 33–39) and Amarillo, Texas (Tr. 89–93).

Shortly after petitioner had left the Amarillo service station, the attendant, discovering the counterfeit bill, summoned the Amarillo police. He gave them a description of petitioner and identified the 1968 Cadillac which petitioner was driving. About an hour later, the police arrested petitioner as he drove away from an Amarillo restaurant (Tr. 95–97, 106–108). They drove his automobile to the police station and examined its contents for valuables, removing several items from the trunk for safekeeping. The automobile was then taken to a nearby garage where it was impounded (Tr. 109–110, 114–115).

The following morning, an Amarillo police officer telephoned the federal Secret Service office in Dallas,

Texas, and discussed the question of obtaining a search warrant to search the Cadillac. The state police then proceeded to obtain a state warrant from a justice of the peace to search the automobile for counterfeit money and implements designed and adapted for counterfeiting (Tr. 119, 122, 130, 147–148).[1] In the search that followed, the police found thirty counterfeit $5.00 notes under the front floor mat of the automobile (Tr. 127).

At trial, petitioner sought to suppress the counterfeit bills by arguing that the warrant was an invalid federal warrant under Rule 41(a) of the Federal Rules of Criminal Procedure since it had not been issued by a judge of a state court of record (Tr. 121–126, 177–183).[2] The trial judge rejected this contention and admitted the fruits of the search into evidence. He ruled that the "search was essentially a state search" and that, even if considered to be a federal search, the warrant coming from a justice of the peace court in Texas was still valid (Tr. 183–185). In affirming, the court of appeals noted that the validity of the search warrant under Rule 41(a) was not determinative here. It pointed out that because petitioner was using the Cadillac to transport contraband, the vehicle could properly have been searched without a search warrant pursuant to the Contraband Seizure Act, 49 U.S.C. 781–783 (Pet. App. A–4).

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[1] The police officer said he would have obtained the search warrant even if he had not spoken to the federal agent (Tr. 134).

[2] Petitioner also contended that the warrant was based upon an insufficient affidavit. That argument is not made here.

ARGUMENT

1. Petitioner reargues here that the state search failed to meet Fourth Amendment standards (Pet. 12). As pointed out by the court of appeals, however, the Amarillo police had probable cause to believe that petitioner had violated federal law in passing a $5.00 counterfeit note at an Amarillo service station (Pet. App. A–4). They had been informed that he was driving a 1968 Cadillac. On this basis, they properly could have carried out an immediate search of the automobile at the police station, not only for valuables, but for counterfeit currency. See *Chambers* v. *Maroney*, No. 830, O.T., 1969, decided June 22, 1970. The fact that the officers delayed a thorough search of the Cadillac until after they had consulted a federal Secret Service agent and had obtained a state search warrant from a Texas justice of the peace did not violate the Fourth Amendment. This is so whether the search is considered to be state or federal.

As a state search, there was clearly sufficient basis for issuance of the warrant by a local justice of the peace on submission of an affidavit setting forth information that a counterfeit $5.00 note had been passed at a local gasoline station.[3]

Treated as a federal search, the actions of the officers were fully authorized under 49 U.S.C. 781–783.

[3] Under Texas law a search warrant may be issued to "search places where it is alleged implements are kept for use in forging or counterfeiting." Article 18.02, Texas Code of Criminal Procedure. While Texas counterfeit statutes are limited to false coins, it is also an offense under Texas law to obtain property by false pretenses. See Articles 1012, 1545, Texas Penal Code.

Petitioner concedes (Pet. 12) that "had a federal officer * * * seized and searched his automobile" pursuant to this statute, "the evidence found would be admissible." However, he argues for a different result because the search and seizure were conducted by state officers who admittedly (Pet. 6, 10) were cooperating with federal officers. As the court below correctly held, the statute makes no such fine distinction (Pet. App. A3–A4). Instead, it makes it the duty of any officer *authorized by law* to seize vehicles known to be used to transport contraband. Counterfeit federal reserve notes are contraband. 49 U.S.C. 781(b)(3).

Petitioner advances the additional argument that in any event his automobile had never been properly "seized" by the Amarillo police. This contention is equally unfounded. We point out that the state officers in this case were in effect acting on behalf of the Dallas federal agents at the time they searched the automobile for counterfeit currency. The court of appeals was entirely correct in concluding that the impounding of the Cadillac by the Amarillo police was in these circumstances a proper seizure within the meaning of the federal forfeiture statute (Pet. App. A5–A6). Accordingly, a search even without a warrant would not have infringed petitioner's Fourth Amendment rights. *Cooper* v. *California*, 386 U.S. 58; see *United States* v. *Francolino*, 367 F. 2d 1013, 1018–1023 (C.A. 2), certiorari denied, 386 U.S. 960; *United States* v. *Troiano*, 365 F.2d 416, 418–419 (C.A. 3); *Drummond* v. *United States*, 350 F.2d 983, 988 (C.A.

8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944.[4]

There is, therefore, no occasion on this petition to reach the question whether a warrant obtained by a state officer, even if acting for a federal purpose, is invalid when it conforms to local law and the requirements of the Fourth Amendment, but not to the procedure laid down in Rule 41(a). See *Navarro* v. *United States*, 400 F.2d 315 (C.A. 5). See also *United States* v. *Ravich*, 421 F.2d 1196, 1201, note 5 (C.A. 2), pending on petition for certiorari, No. 5144.

2. Petitioner also asserts that because the court of appeals affirmed the decision of the trial court on the basis of a "legal theory" (Pet. 9) not relied on below, he was deprived of "the opportunity to develop factual evidence as to the authority of the local police to make the search." However, the issue of whether local police are, under the circumstances of this case, authorized to make a search of an automobile known to be used to transport contraband presents a legal rather than a factual question. As the court concluded in *Egan* v. *Teets*, 251 F.2d 571, 576 (C.A. 9):

> It is a rule of appellate adjudication that, if the order or judgment under review is not sustainable on the ground relied upon by the trial

[4] In *Rent* v. *United States*, 209 F. 2d 893, 896 (C.A. 5), as petitioner states, the court did note that the federal officer did not purport to "seize" the automobile under the forfeiture statutes. However, there the search in essence was held to be unjustified because it was not incident to an arrest. The issue did not turn on whether there had been a proper seizure under the forfeiture statutes. See also *Vaccaro* v. *United States*, 296 F.2d 500 (C.A. 5); *Brett* v. *United States*, 412 F.2d 401, 405–406 (C.A. 5).

judge, but is sustainable on another ground which could be and was fairly presented on appeal, there should be an affirmance.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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